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Panel Proceedings**

INDIA – MEASURES CONCERNING SUGAR AND SUGARCANE

(DS580)

**AUSTRALIA'S OPENING STATEMENT AT THE FIRST SUBSTANTIVE
MEETING WITH THE PARTIES AND THIRD PARTIES**

8 December 2020

TABLE OF CONTENTS

TABLE OF CASES	3
LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS	3
LIST OF JOINT EXHIBITS.....	4
LIST OF AUSTRALIA'S EXHIBITS	4
I. INTRODUCTION	5
II. INDIA'S DOMESTIC SUPPORT TO SUGARCANE VASTLY EXCEEDS ITS <i>DE MINIMIS</i> LIMIT	7
A. THE FACTS UNDERPINNING AUSTRALIA'S DOMESTIC SUPPORT CALCULATIONS ARE NOT IN DISPUTE	8
B. THE PANEL SHOULD REJECT INDIA'S ARGUMENT THAT MARKET PRICE SUPPORT CAN ONLY EXIST WHEN THE AAP IS PAID BY GOVERNMENT OR ITS AGENTS	10
III. EXPORT SUBSIDIES	14
A. INDIAN SUGAR MILLS ARE REQUIRED TO EXPORT SUGAR TO BE ELIGIBLE TO RECEIVE ASSISTANCE UNDER INDIA'S PRODUCTION SUBSIDIES, BUFFER STOCK SUBSIDIES AND MAEQ SCHEME	14
B. THE MAEQ SCHEME IS WITHIN THE PANEL'S TERMS OF REFERENCE.....	17
C. THE PANEL SHOULD REJECT INDIA'S LEGAL ARGUMENTS	19
1. Australia is not required to provide evidence of actual disbursements or payments to establish the existence of a subsidy	19
2. India has not established a defence under Article 9.4 of the Agreement on Agriculture.....	21
3. India is not exempt from the prohibition on export subsidies under Article 3 of the SCM Agreement	23
IV. CONCLUSION.....	24

TABLE OF CASES

Short Title	Full Case Title and Citation
<i>Argentina – Textiles and Apparel</i>	Panel Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/R, adopted 22 April 1998, as modified by Appellate Body Report WT/DS56/AB/R, DSR 1998:III, p. 1033
<i>China – Agricultural Producers</i>	Panel Report, <i>China – Domestic Support for Agricultural Producers</i> , WT/DS511/R and Add.1, adopted 26 April 2019
<i>European Communities – Hormones</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
<i>India – Export Related Measures</i>	Panel Report, <i>India – Export Related Measures</i> , WT/DS541/R and Add.1, circulated 31 October 2019, appealed 19 November 2019
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5
<i>Korea – Various Measures on Beef</i>	Panel Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by Appellate Body Report WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, p. 59
<i>Turkey – Textiles</i>	Panel Report, <i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> , WT/DS34/R, adopted 19 November 1999, as modified by Appellate Body Report WT/DS34/AB/R, DSR 1999:VI, p. 2363
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS

Abbreviation	Full Form or Description
AAP	Applied Administered Price
AMS	Aggregate Measurement of Support
DFPD	Department of Food and Public Distribution
FERP	Fixed External Reference Price
FRP	Fair and Remunerative Price
MAEQ	Maximum Admissible Export Quantities
MIEQ	Minimum Indicative Export Quotas
MPS	Market Price Support
SAP	State Advised Price

Abbreviation	Full Form or Description
SCM Agreement	Agreement on Subsidies and Countervailing Measures
WTO	World Trade Organization

LIST OF JOINT EXHIBITS

Exhibit No.	Exhibit Name
JE-147	Ministry of Statistics and Programme Implementation (MOSPI), National Accounts Statistics 2020, Statement 8.1.2 Crop-wise value of output
JE-148	The Sugarcane (Control) Order 1966 (prior to 2009)
JE-149	Dhampur Sugar Mills Limited Annual Report 2019–20
JE-150	USDA Sugar: World Markets and Trade, May 2020
JE-151	Notification No. 1(14)/2019-SP-I of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution of 15 September 2020
JE-152	The Indian Express, "Explained: Why the sugar industry desperately needs export subsidy this season", 5 November 2020

LIST OF AUSTRALIA'S EXHIBITS

Exhibit No.	Exhibit Name
AUS-1 (Revision 2)	Australia's domestic support calculations, Microsoft Excel workbooks, Revision 2

I. INTRODUCTION

1. Mr Chair, Panellists, fellow delegates — hello again. For the record, my name is Ravi Kewalram, and I am the acting Chief Trade Law Officer in Australia's Department of Foreign Affairs and Trade.

2. It gives Australia no pleasure to bring this dispute against India, a valued friend and a partner, with whom we share a commitment to the rules-based trading system.

3. However, even close friends sometimes seek to resolve disagreements through WTO dispute settlement. Australia considers that India's measures with respect to sugar and sugarcane are inconsistent with its WTO obligations. India's measures are impairing the benefits that accrue to Australia under the WTO covered agreements and are harming the interests of Australia's globally competitive sugar industry.

4. India's practice of setting floor prices for sugarcane via the Fair and Remunerative Price (FRP) and the State Advised Prices (SAPs) – combined with its myriad of schemes that support the payment of those prices – creates a highly distorted domestic market for both sugarcane and sugar.

5. India is the world's second largest sugar producer and now its third largest exporter.¹ India's sugar exports – supported by prohibited export subsidies – have been growing, and the increasing volume of heavily subsidised Indian sugar on the global market is significantly distorting international trade in this commodity.²

6. India is entitled to provide some non-exempt domestic support to its sugarcane farmers, so long as that support does not exceed 10 per cent of the total value of production in any sugar season. India has not contested that it is obliged to ensure its non-exempt domestic support is equal to or less than *de minimis*.³

7. Australia has submitted evidence and calculations demonstrating that India's non-exempt domestic support for sugarcane in the five sugar seasons from 2014–15 to 2018–19 vastly exceeded its permitted *de minimis* level.

¹ USDA Sugar: World Markets and Trade, May 2020 (Exhibit JE-150), pp. 6–7.

² USDA Sugar: World Markets and Trade, May 2020 (Exhibit JE-150), p. 7; "India's indigestible sugar lump: A sickly tale of price distortions", *The Economist*, 28 September 2019 (Exhibit JE-40).

³ India's first written submission, paras. 54, 57–58.

8. By India's admission, the principal measures through which it maintains this level of domestic support – the FRP and the SAPs – remain in effect today.⁴

9. In an attempt to defend its domestic support measures, India has sought to argue that direct procurement of an agricultural product by a government or its agent is a "necessary element" of market price support (MPS).⁵ This argument is not supported by the text of the Agreement on Agriculture and should be rejected for the reasons I will explain shortly.

10. Turning then to India's export subsidies for sugar, India has not contested that it has no export subsidy reduction commitment for sugar in its Schedule.⁶ And India agrees that Members are obliged to not provide export subsidies for unscheduled agricultural products.⁷

11. India's defence of its WTO-inconsistent measures relies on unjustifiably narrowing the scope of the Panel's terms of reference – by excluding the Maximum Admissible Export Quantities (MAEQ) scheme – and on flawed interpretations of applicable legal standards that find no support in the text of the Agreement on Agriculture nor the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

12. Australia asks the Panel to find that India's MAEQ scheme is a part of India's ongoing policy of subsidising sugar exports and is therefore within the Panel's terms of reference. India's contention that Australia has to prove an actual disbursement or payment must also be rejected, as must India's assertion that it is exempt from the prohibition on export subsidies under the SCM Agreement.

13. India has also failed to comply with its obligations to notify its domestic support and export subsidies relating to sugarcane and sugar.

14. India's position is that the Agreement on Agriculture does not impose binding notification obligations. In making this argument, India overlooks the mandatory language of Article 18, and instead relies on a Committee on Agriculture document that is of less-than-treaty status.⁸

⁴ India's first written submission, paras. 16–18, 29–30.

⁵ India's first written submission, para. 63. See also paras. 59–65.

⁶ India's first written submission, para. 85; India's responses to questions from the Panel prior to the first substantive meeting, 18 June 2020, question 39, answered as question 38, p. 25.

⁷ India's first written submission, para. 85.

⁸ India's first written submission, para. 159.

15. India does not contest that it has obligations under the SCM Agreement and under the General Agreement on Tariffs and Trade 1994 to notify Members of certain subsidies.

16. Australia asks the Panel to find that India's protracted failure to submit notifications of its measures concerning sugar and sugarcane is inconsistent with its WTO obligations.

17. I will now explain why the Panel should also uphold Australia's other claims, first, with respect to domestic support for sugarcane, and second, regarding India's export subsidies for sugar.

II. INDIA'S DOMESTIC SUPPORT TO SUGARCANE VASTLY EXCEEDS ITS *DE MINIMIS* LIMIT

18. Australia has met its burden of establishing a *prima facie* case that India's non-exempt domestic support to sugarcane violates its commitment under the Agreement on Agriculture to not provide support in excess of *de minimis*.

19. Taking into account the latest official Indian data⁹, India's domestic support to sugarcane as a percentage of its total value of its production was, as my Brazilian colleague also referred to in his comments, 115 per cent in the 2014–15 sugar season; 118 per cent in 2015–16, 113 per cent in 2016–17; 109 per cent in 2017–18, and 109 per cent again in 2018–19.¹⁰

20. If the Panel accepts Australia's calculations – or through its own calculations finds India's level of non-exempt domestic support exceeds 10 per cent of the value of production – then it should uphold Australia's domestic support claims.

⁹ Ministry of Statistics and Programme Implementation (MOSPI), National Accounts Statistics 2020, Statement 8.1.2 Crop-wise value of output (**Exhibit JE-147**) (providing updated value of production figures for 2016–17 and 2017–18, as well as an official figure for 2018–19; to replace the value of production figures in Tables 1, 10, 12, 13, 15, 18, 22, 23 and 24 of Australia's first written submission).

¹⁰ Figures rounded to the nearest percentage. See Australia's domestic support calculations, Microsoft Excel workbooks, Revision 2 (**Exhibit AUS-1 (Revision 2)**).

A. THE FACTS UNDERPINNING AUSTRALIA'S DOMESTIC SUPPORT CALCULATIONS ARE NOT IN DISPUTE

21. India has not disputed the facts underpinning Australia's domestic support calculations.¹¹ In view of the Panel's ruling of 9 November 2020, there are now no contested facts that could have a bearing on the calculations.

22. Consistent with the methodology set out in Annex 3 of the Agreement on Agriculture, Australia's calculations of India's Aggregate Measurement of Support (AMS) for sugarcane include the non-exempt domestic support India provides through MPS, non-exempt direct payments and other non-exempt policies.

23. India's MPS consists of:

- the FRP; and
- the SAPs in six states.

24. India agrees that it continues to set the FRP and has not contested the floor prices established by that measure in any of the relevant sugar seasons.¹²

25. India agrees that four of the six states (Haryana, Punjab, Uttarakhand and Uttar Pradesh) continue to set a SAP.¹³ India also does not dispute that these four states applied SAPs during the five sugar seasons for which Australia has presented domestic support calculations.¹⁴

26. With respect to the fifth state (Tamil Nadu), India argues that it no longer sets a SAP.¹⁵ Australia agrees.¹⁶ But India does not dispute that Tamil Nadu did – in some previous sugar seasons – set a SAP, as reflected in Australia's calculations and supported by the evidence. In fact, India's claim that Tamil Nadu's SAPs in some previous sugar seasons have "expired" is essentially an admission that Tamil Nadu did set SAPs in those seasons.¹⁷

¹¹ Brazil and Guatemala present identical calculations.

¹² India's first written submission, paras. 16–18, 41.

¹³ India's first written submission, paras. 29–30.

¹⁴ India's first written submission, paras. 29–30, 42(v), 42(vi) and 42(viii).

¹⁵ India's first written submission, para. 30.

¹⁶ Australia's first written submission, paras. 55–57.

¹⁷ India's first written submission, para. 42(vii).

27. Finally, in relation to the sixth state, India argues that, as at 18 March 2020, the state of Bihar no longer sets a SAP.¹⁸ Australia does not agree with this claim. However, it is not necessary for the Panel to make a finding in relation to this factual matter because India has not disputed that Bihar previously set a SAP. And Australia has presented evidence that Bihar did so, in each of the sugar seasons included in the calculations.¹⁹

28. In addition to MPS, Australia's calculations include three state programmes that constitute non-exempt direct payments or other non-exempt policies that do not maintain a gap between the Applied Administered Price (AAP) and the Fixed External Reference Price (FERP).²⁰

29. India does not dispute the existence of these state programmes in the relevant seasons or the budgetary outlays made in connection with them. Further, India does not contest that they are non-exempt direct payments or other non-exempt policies that may be added to the AMS calculation.

30. Also, Australia asks the Panel to find that India is maintaining or has maintained various other measures directed principally at maintaining the mandated minimum sugarcane price and therefore the "gap" between the AAP and the FERP.²¹ Consistent with paragraph 8 of Annex 3, Australia has not included the budgetary payments for these measures in calculating India's AMS.

31. With the exception of its claim that the purchase tax remissions schemes applied by certain states have been discontinued with effect from 14 November 2018, India does not dispute the existence or nature of any of these measures, and therefore does not contest Australia's evidence in that regard.

¹⁸ India's first written submission, para. 30. See also, Communication F. No. 21(3)/2019-SP-I, Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution, dated 18 March 2020 (**Exhibit IND-4**).

¹⁹ Australia's first written submission, paras. 48–49, including Table 4 and the exhibits cited therein.

²⁰ Australia's first written submission, paras. 189–205.

²¹ Australia's first written submission, paras. 181–186.

32. Moreover, India has not argued that any of the measures are exempt. Australia therefore requests that the Panel find these to be measures through which India provides (or has provided) domestic support to sugarcane producers in excess of *de minimis*.²² Although we have not added the budgetary payments for these measures into our calculations of India's AMS, this does not mean those measures are exempt. The Panel should, therefore, include them in its findings and recommendations.

33. As I have demonstrated then, there are no disputed factual matters that the Panel needs to resolve in order to uphold Australia's claim that India's level of domestic support to sugarcane violates its obligations under the Agreement on Agriculture.

B. THE PANEL SHOULD REJECT INDIA'S ARGUMENT THAT MARKET PRICE SUPPORT CAN ONLY EXIST WHEN THE AAP IS PAID BY GOVERNMENT OR ITS AGENTS

34. India's defence of its MPS measures – specifically the FRP and the SAPs – depends entirely on its argument that "market price support only exists where the government or its agent pays the administered price and procures the product".²³ India has even gone so far so as to claim that Australia agrees with this interpretation.²⁴ That is a clear mischaracterization of Australia's submissions.

35. We do not agree and we urge the Panel to reject India's attempt to defend its measures by limiting the scope of MPS in a manner contrary to the ordinary meaning of the relevant provisions, read in their context and in light of the Agreement on Agriculture's object and purpose.

36. India's argument essentially has two elements.

37. First, India claims that all MPS under paragraph 1 of Annex 3 must be in the form of a subsidy. It bases this assertion on the words "or any other subsidy" which appear in that paragraph.²⁵

²² Australia's first written submission, para. 205; Australia's responses to Panel questions 1 to 44, 18 June 2020, question 20(b), paras. 47–51; question 26(b), paras. 68–70.

²³ India's responses to questions from the Panel prior to the first substantive meeting, 18 June 2020, question 18(c), p. 14.

²⁴ India's first written submission, para. 62, citing Australia's first written submission, para. 138.

²⁵ India's first written submission, para. 63; India's responses to questions from the Panel prior to the first substantive meeting, 18 June 2020, question 18(a), p. 14.

38. Second, India argues that paragraph 2 of Annex 3 limits the scope of those things that may be considered subsidies under paragraph 1 to "budgetary outlays and revenue foregone by government or their agents".²⁶

39. Applying this then to MPS, India submits that the government or its agents must pay the AAP for it to qualify as a subsidy and therefore as MPS falling within paragraph 1.²⁷ Employing this dubious logic, India argues that the FRP and SAPs are not MPS that may be included in the calculation of India's AMS for sugarcane.²⁸ This is also India's only stated objection to Australia's domestic support calculations.²⁹

40. There are many reasons why India's argument should fail. But I will limit myself to three compelling reasons why we request the Panel to reject India's argument.

41. The first flaw in India's argument is that it relies on an erroneous interpretation of paragraphs 1 and 2 of Annex 3.

42. The purpose of Annex 3 is to stipulate the method for calculating in monetary terms a Member's non-exempt domestic support or AMS. Paragraph 1 of Annex 3 does not limit the scope of domestic support to subsidies as India suggests. That paragraph refers to the three kinds of support that may constitute domestic support, namely MPS, non-exempt direct payments and any other non-exempt subsidy or policy.

43. The words "or any other subsidy" do not have the meaning that India seeks to give them. They are simply intended to ensure that non-exempt support that does not constitute MPS or a non-exempt direct payment is captured in the AMS calculation. In other words, they are there to ensure that all non-exempt domestic support is included in the AMS. The word "other" is used because both MPS and non-exempt direct payments may be achieved by or constitute subsidies. It does not follow that they must be subsidies.³⁰

44. India's reliance on paragraph 2 of Annex 3 to support its argument is similarly problematic.

²⁶ Agreement on Agriculture, Annex 3, para. 2. See India's first written submission, para. 62; India's responses to questions from the Panel prior to the first substantive meeting, 18 June 2020, question 25(b), p. 18.

²⁷ India's first written submission, para. 62–63.

²⁸ India's responses to questions from the Panel prior to the first substantive meeting, 18 June 2020, question 25(a), p. 18.

²⁹ India's responses to questions from the Panel prior to the first substantive meeting, 18 June 2020, question 25(b), p. 18.

³⁰ Australia's first written submission, para. 143.

45. In seeking to explain why government procurement is – in India's words – an "essential" element of MPS³¹, India first refers to paragraph 2 as offering "guidance on what may constitute" MPS.³² India then takes an interpretive leap by claiming paragraph 2 "delineates the scope of subsidies under paragraph 1".³³ We cannot discern any textual basis for this interpretation of paragraph 2, which simply identifies that both budgetary outlays and revenue foregone are to be included in calculating AMS as described in paragraph 1.

46. India's suggested interpretations of these paragraphs are also inconsistent with the Agreement on Agriculture's object and purpose, which is relevantly to discipline and reduce domestic support measures with a view to preventing distortions in world agricultural markets.³⁴ Distortions occur when prices or production are not determined by the market. Price support is recognized in the Agreement as inherently trade-distorting and as having production effects.³⁵

47. India's FRP and SAP measures clearly distort the sugar trade and affect India's production of sugarcane by assuring farmers that their cane can be sold for at least the minimum price. Those measures support the price of all sugarcane grown in India, yet, under India's flawed interpretation, they would not be subject to India's commitment to limit its non-exempt domestic support.

48. The second problem with India's preferred interpretation of "market price support" is that India has virtually ignored the only other paragraph in Annex 3 which references MPS: paragraph 8. India fails to consider that paragraph in setting out the legal standard under the Agreement on Agriculture or in arguing that the government (or its agents) must pay the AAP.³⁶ This is unsurprising because paragraph 8 undermines India's argument.

³¹ India's responses to questions from the Panel prior to the first substantive meeting, 18 June 2020, question 18(d), p. 15.

³² India's first written submission, para. 62 (emphasis added). See also, India's responses to questions from the Panel prior to the first substantive meeting, 18 June 2020, question 18(c), p. 14.

³³ India's first written submission, para. 62.

³⁴ Agreement on Agriculture, preamble.

³⁵ See Australia's first written submission, para. 126.

³⁶ India's first written submission, paras. 52–65.

49. The first sentence of paragraph 8 sets out the formula for calculating the value of MPS.³⁷ The effect of this sentence is that MPS will exist – or have a measurable value – when there is a gap between a FERP and an AAP. Paragraph 8, second sentence, then states that, where budgetary payments are made to maintain this gap, they must not be included in the AMS. As the formula determines the value of the support provided by the AAP, adding budgetary payments made to achieve or maintain the AAP could result in double-counting.

50. Nothing in paragraph 8 suggests that MPS must be a subsidy or is limited to budgetary outlays and revenue foregone by the government (or their agents). Thus, the effect of India's argument is to read into this paragraph a limitation that is not there.

51. By contrast, the relevant findings of the panels in *Korea – Various Measures on Beef* (as upheld by the Appellate Body) and in *China – Agricultural Producers* accurately interpreted paragraph 8 of Annex 3 and the concepts used therein in a manner consistent with their underlying objective.³⁸ India's argument is incompatible with those findings.

52. Australia disagrees with India that these prior reports do not support the complainants' views and that they are "inapplicable" because the facts are "materially different".³⁹ The facts of those disputes do differ but not in a manner that materially changes how the provisions and concepts should be properly interpreted and applied. India has been unable to demonstrate why any of the reasoning in those previous disputes is defective.

53. The third major failing of India's argument is that it would require the Panel to interpret India's domestic support obligations divorced from their context. Australia considers that context includes India's tables of supporting material incorporated by reference in Part IV of India's Schedule.⁴⁰

³⁷ Australia's first written submission, paras. 113–115.

³⁸ Appellate Body Report, *Korea – Various Measures on Beef*, paras. 116, 120; Panel Report, *Korea – Various Measures on Beef*, paras. 826–827, 831–832; Panel Report, *China – Agricultural Producers*, paras. 7.136, 7.277, 7.282–7.284, 7.295.

³⁹ India's first written submission, paras. 69, 74 and 80.

⁴⁰ G/AG/AGST/IND. See also, India's Schedule, Part IV, Column 3.

54. During the base period specified in India's supporting tables, the Sugarcane (Control) Order 1966 then in force fixed the minimum price of sugarcane to be paid by all producers of sugar (the mills) to the producers of sugarcane (the farmers).⁴¹ It is evident from India's supporting table for sugarcane that India considered this predecessor to the FRP established an AAP and constituted MPS.⁴²

55. In summary, Australia submits the Panel should reject India's argument constraining the meaning of MPS. Once that argument is rejected, Australia's calculations of India's domestic support demonstrate that India has violated its domestic support commitments.

III. EXPORT SUBSIDIES

56. I turn now to export subsidies. Mr Chair and members of the Panel – India's production-incentivising domestic support leads to the overproduction of sugarcane and to excessive surplus sugar stocks.⁴³ As the costs of sugar production in India are higher than the world price, exports are unprofitable for mills. In an effort to ameliorate this oversupply problem, the Central Government provides WTO-inconsistent export subsidies to enable mills to access international markets.⁴⁴ Thus to fix the market distortions created by its domestic support, India has resorted to distorting the international sugar market as well.

A. INDIAN SUGAR MILLS ARE REQUIRED TO EXPORT SUGAR TO BE ELIGIBLE TO RECEIVE ASSISTANCE UNDER INDIA'S PRODUCTION SUBSIDIES, BUFFER STOCK SUBSIDIES AND MAEQ SCHEME

57. At issue in this dispute are India's production subsidies, buffer stock subsidies and the MAEQ scheme. Australia has outlined the facts of these measures in detail in its first written submission, comments on India's request for a preliminary ruling and responses to the Panel's questions.

⁴¹ Sugarcane (Control) Order 1966 (**Exhibit JE-148**), Clause 3(1). It also fixed the minimum price payable for sugarcane by producers of khandsari sugar: see Clause 4. See also, Australia's first written submission, para. 25.

⁴² G/AG/AGST/IND, p. 28. See also, Explanatory Notes, p. 3: "India does not provide any product specific support other than market price support".

⁴³ See Australia's first written submission, para. 5; USDA Sugar: World Markets and Trade, May 2020 (**Exhibit JE-150**), pp. 2 and 8.

⁴⁴ See Green Pool, "India Analysis", 9 November 2018 (**Exhibit AUS-2**); "Indian Sugar Glut Pushes Prices Close to Decade Lows; New Delhi is expected to renew subsidy program that will boost exports from the world's biggest sugar producer", *Wall Street Journal*, 26 August 2019 (**Exhibit AUS-4**); The Indian Express, "Explained: Why the sugar industry desperately needs export subsidy this season", 5 November 2020 (**Exhibit JE-152**).

58. What the facts disclose is that, at their core, each of these measures operates in the same way. Each scheme shares a set of common features. So, let's briefly recall them.

59. Under India's production subsidies, buffer stock subsidies and MAEQ scheme, the Central Government makes financial assistance available to sugar mills. Each legal instrument notifying these schemes states prominently, and in virtually identical terms, that the purpose of the financial assistance is to pay sugarcane price dues and arrears.⁴⁵ The assistance is paid by the Central Government, on behalf of eligible sugar mills, into sugarcane farmers' bank accounts.

60. A crucial element common to every seasonal iteration of India's production subsidies, buffer stock subsidies and MAEQ scheme is that sugar mills must export sugar – in accordance with MIEQ or MAEQ quotas, as the case may be – to be eligible to claim and receive the assistance.

61. In relation to the MAEQ scheme, India has said: "[t]he requirement to export sugar in accordance with a mill's MAEQ is a prerequisite to receive payments under [the] MAEQ scheme".⁴⁶

62. Nevertheless, India disputes the facts underpinning the export contingency of its production subsidies and buffer stock subsidies, saying: "these schemes do not contain any requirement to export a certain amount of sugar each year".⁴⁷

⁴⁵ See: Notification No. 20(43)/2015-S.P.-I of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution of 2 December 2015 (**Exhibit JE-76**), paras. 1 and 2; Australia's first written submission, p. 147; Notification No. 1(5)/2018-S.P.-I of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution of 9 May 2018 (**Exhibit JE-75**), paras. 1 and 3; Australia's first written submission, p. 148; Notification No. 1(14)/2018-S.P.-I of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution of 5 October 2018 ("Scheme for assistance to sugar mills") (**Exhibit JE-74**), paras. 1 and 3; Australia's first written submission, p. 149; Notification No. 1(8)/2019-SP-I. of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution of 31 July 2019 (**Exhibit JE-77**), para. 1; Australia's first written submission, para. 155.

⁴⁶ India's responses to questions from the Panel prior to the first substantive meeting, 18 June 2020, question 33(a), answered as question 32(a), p. 22.

⁴⁷ India's responses to questions from the Panel prior to the first substantive meeting, 18 June 2020, question 33(b), answered as question 32(b), p. 22.

63. This is simply not accurate. The instruments notifying the 2017–18⁴⁸ and 2018–19⁴⁹ schemes stipulate that mills must have complied with all orders (or directives) of the Department of Food and Public Distribution (DFPD) to be eligible for the subsidies.

64. India agrees that MIEQ orders constitute "orders" of DFPD.⁵⁰ Thus, India cannot deny that eligibility to claim assistance under these schemes is conditioned on compliance with MIEQs – mandatory orders, issued by DFPD, that require mills to export an allocated quota of sugar.

65. Indeed, India's sugar exports have risen in accordance with those orders. Exports totalled 2.236 million metric tonnes in 2017–18 and rose to 4.7 million metric tonnes in 2018–19,⁵¹ against respective MIEQ allocations of 2 million metric tonnes in 2017–18⁵² and 5 million metric tonnes in 2018–19.⁵³

66. Additionally, export in accordance with MAEQ allocations is a condition of eligibility for the buffer stock scheme that India introduced in 2019 for the 2018–19 and 2019–20 sugar seasons. DFPD issued guidelines on the MAEQ scheme earlier this year that make a clear link between buffer stock payments and MAEQ targets.⁵⁴

67. We therefore ask the Panel to find that India has failed to rebut Australia's *prima facie* case that these measures are export contingent. India's submission that its production subsidies and buffer stock subsidies do not contain any requirement to export sugar is not supported by the facts.

⁴⁸ Notification No. 1(5)/2018-S.P.-I of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution of 9 May 2018 (**Exhibit JE-75**), para. 2(c).

⁴⁹ Notification No. 1(14)/2018-S.P.-I of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution of 5 October 2018 ("Scheme for assistance to sugar mills") (**Exhibit JE-74**), para. 2(c); Notification No. 1(6)/2018-SP-I of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution of 31 December 2018 (**Exhibit JE-112**); Notification No. 1(6)/2018-SP-I of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution of 15 June 2018 (**Exhibit JE-78**). The 2015-16 production subsidy scheme was even more specific: its notification said that mills needed to have exported at least 80 per cent of their MIEQ allocations to be eligible for the subsidy that season. See Notification No. 20(43)/2015-S.P.-I of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution of 2 December 2015 (**Exhibit JE-76**), para. 2(iii).

⁵⁰ India's responses to questions from the Panel prior to the first substantive meeting, 18 June 2020, question 31, answered as question 30, p. 22.

⁵¹ USDA Sugar: World Markets and Trade, May 2020 (**Exhibit JE-150**), p. 7.

⁵² Notification No. 1(4)/2018-S.P.-I of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution of 9 May 2018 (**Exhibit JE-111**).

⁵³ DFPD Order of 28 September 2018, "Allocation of sugar factory-wise Minimum Indicative Export Quotas (MIEQ) of sugar for export in sugar season 2018-19 under tradable export scrip schemes" (**Exhibit JE-108**).

⁵⁴ MAEQ Review Guidelines, 18 February 2020 (**Exhibit JE-144**), para. 2(vi); MAEQ Review Guidelines, 13 April 2020 (**Exhibit JE-145**), para. 3; Australia's answer to Panel question 8, paras. 17–19.

B. THE MAEQ SCHEME IS WITHIN THE PANEL'S TERMS OF REFERENCE

68. Turning to India's request for a preliminary ruling with respect to the inclusion of India's MAEQ scheme in the Panel's terms of reference, Australia recalls that it made its panel request on 15 August 2019. India introduced the MAEQ scheme on 12 and 16 September 2019.⁵⁵ Australia does not hide from this fact.⁵⁶

69. As Australia has demonstrated, the MAEQ scheme exhibits the same core features as India's production and buffer stock subsidies.

70. India's claim that its export subsidies are not the same "in essence" and that the MAEQ scheme is therefore outside the Panel's terms of reference is an attempted distraction.

71. Australia has addressed India's arguments in this regard at length in its comments on India's request for a preliminary ruling.⁵⁷ For now, I will just briefly summarise Australia's positions in response:

- First, contrary to India's assertions, the nature of the assistance provided does not differ under India's production and buffer stock subsidies and MAEQ scheme. The assistance provided under all these measures must be used, in the first instance, to pay sugarcane price arrears. India accepts this fact.⁵⁸ There is no meaningful difference between the measures in this respect.
- Second, Australia does not dispute that the measures contain some different eligibility criteria.⁵⁹ However, those differences are immaterial to the key issues to be determined. The salient point is that mills must export sugar in accordance with export quotas to be eligible for financial assistance under all measures.

⁵⁵ Notification No. 1(14)/2019-S.P.-I. of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution of 12 September 2019 (**Exhibit JE-114**); Notification No. 1(14)/2019-S.P.-I. of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution of 16 September 2019 (**Exhibit JE-115**).

⁵⁶ Australia's comments on India's request for a preliminary ruling, 1 April 2020, para. 64.

⁵⁷ Australia's comments on India's response regarding India's request for a preliminary ruling, 4 May 2020, paras. 59–78.

⁵⁸ India's response to the complainants' comments on India's request for a preliminary ruling, 27 April 2020, para. 56.

⁵⁹ Australia's comments on India's response regarding India's request for a preliminary ruling, 4 May 2020, para. 74.

- Finally, Australia acknowledges that the amounts of assistance and the methodologies used to determine them differ across the schemes. However, what matters is that, in every case, assistance is tied to export performance.⁶⁰

72. Australia should not have to pursue a moving target. Nor can Australia bring a dispute against India each time it introduces a new iteration of its annual export subsidy program – especially one that in essential terms mirrors the design, structure and operation of its predecessors and is manifestly a federal level measure pertaining to sugar or sugarcane which provides subsidies contingent upon export performance of the kind identified in Australia's panel request.⁶¹

73. Drawing an arbitrary distinction between the MAEQ scheme and the raft of other measures that collectively, and uniformly, give effect to India's ongoing policy of subsidising sugar exports, does not serve the parties' interest in a prompt and positive resolution of this dispute.⁶²

74. This is particularly the case when India's practice of introducing new rounds of export subsidies on an annual, seasonal basis, is so apparent on the evidence before the Panel.

75. Drawing such an arbitrary distinction would shield India from accountability for its WTO obligations. Further, India's position implies that a measure's label matters more than its purpose, operation and market impact.

76. India says the MAEQ scheme "may be adequately examined and taken into consideration, if required, during the stage of compliance".⁶³ Australia submits that the measure is rightly before you, rightly before this Panel, notes that India has extended the MAEQ scheme to December 2020,⁶⁴ and asks that the Panel address its ongoing impact by dealing with it in the present dispute.

⁶⁰ Australia's comments on India's response regarding India's request for a preliminary ruling, 4 May 2020, paras. 77–78.

⁶¹ WT/DS580/7, para. 19.

⁶² Understanding on Rules and Procedures Governing the Settlement of Disputes, Articles 3.3 and 3.7.

⁶³ India's response to the complainants' comments on India's request for a preliminary ruling, 27 April 2020, para. 58.

⁶⁴ Notification No. 1(14)/2019-SP-I of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution of 15 September 2020 (**Exhibit JE-151**).

C. THE PANEL SHOULD REJECT INDIA'S LEGAL ARGUMENTS

77. I will now turn to India's efforts to use flawed legal interpretation in an attempt to defend what are, on the facts, indisputably WTO-inconsistent export subsidies.

1. Australia is not required to provide evidence of actual disbursements or payments to establish the existence of a subsidy

78. Beginning with India's obligations under the Agreement on Agriculture, allow me to outline some matters on which Australia and India appear to agree.

79. India does not dispute that it is prohibited, under Article 8, from providing export subsidies otherwise than in conformity with the Agreement on Agriculture and with commitments specified in its Schedule.⁶⁵

80. India does not dispute that it did not make any export subsidies reduction commitments in relation to sugar, or any agricultural product for that matter, in Part IV, Section II of its Schedule, or its supporting tables.⁶⁶

81. India does not dispute that Article 3.3 prohibits Members from providing export subsidies, of the kinds listed in Article 9.1, for unscheduled agricultural products.⁶⁷

82. Finally, Australia and India agree upon the four elements that must be satisfied to establish the existence of an export subsidy within the meaning of Article 9.1(a).⁶⁸ Indeed, India does not dispute that Australia has established the existence of three of these four elements in relation to its production subsidies, buffer stock subsidies and MAEQ scheme.

83. However, India contends that Australia has failed to establish the existence of one element, namely the existence of a "direct subsidy".⁶⁹

⁶⁵ India's first written submission, para. 85.

⁶⁶ India's first written submission, para. 85; India's responses to questions from the Panel prior to the first substantive meeting, 18 June 2020, question 39, answered as question 38, p. 25.

⁶⁷ India's first written submission, para. 85.

⁶⁸ India's first written submission, para. 100.

⁶⁹ India's first written submission, paras. 105–113.

84. This is because, in India's view, a subsidy exists only when a financial contribution can be proven through evidence that a government entity has actually disbursed funds.⁷⁰ India argues that Australia has not met this evidentiary burden because "the existence of a financial contribution cannot be determined on the basis of the text of [a] measure".⁷¹

85. Australia will respond in full to India's arguments when the time comes for Australia to provide its answer to the Panel's question 11.

86. But, to foreshadow that response, Australia submits that India's arguments regarding the applicable legal standards under Article 9.1(a) of the Agreement on Agriculture and Article 1.1 of the SCM Agreement must fail.

87. India's proposed interpretation finds no support in the text of either agreement.

88. The Agreement on Agriculture recognises that export subsidies within the meaning of Article 9.1 are measurable on the basis of budgetary outlays, whether "allocated or incurred".⁷² This is clear on a reading of the terms of the Agreement in accordance with their ordinary meaning and in context.⁷³

89. Additionally, a financial contribution under Article 1.1 of the SCM Agreement can be constituted by a direct transfer of funds, or potential direct transfers of funds. That is, the provision encompasses prospective transfers, such that it cannot be possible that evidence of an actual disbursement or payment is required to establish the existence of a subsidy.

⁷⁰ India's responses to questions from the Panel prior to the first substantive meeting, 18 June 2020, question 40(a), answered as question 39(a), p. 26.

⁷¹ India's responses to questions from the Panel prior to the first substantive meeting, 18 June 2020, question 40(b), answered as question 39(b), p. 26. See also India's responses to questions from the Panel prior to the first substantive meeting, 18 June 2020, question 40(b), answered as question 39(a), p. 26.

⁷² Agreement on Agriculture, Article 9.2(a)(i).

⁷³ Vienna Convention on the Law of Treaties, Article 31.

90. Moreover, even though it is not required to, Australia has in fact provided evidence of actual disbursements or payments made under India's export subsidy schemes. DFPD budget papers, before the Panel as exhibits JE-121,⁷⁴ AUS-48⁷⁵ and JE-142,⁷⁶ disclose that the Central Government incurred actual expenditure under its production subsidy and buffer stock subsidy schemes in the 2016–17, 2017–18 and 2018–19 financial years.

91. Recently available evidence also demonstrates that Indian sugar mills have received payments under India's production subsidy, buffer stock subsidy and MAEQ schemes.⁷⁷

2. India has not established a defence under Article 9.4 of the Agreement on Agriculture

92. Now, on the matter of the MAEQ scheme and its consistency with the Agreement on Agriculture, Australia maintains that the MAEQ scheme is an export subsidy within the meaning of Article 9.1(a).

93. India has invoked Article 9.4 in its defence, asserting that the measure falls within Article 9.1(d) and (e). Australia does not accept this assertion.

94. Australia recognises that the text of the legal instrument notifying the measure suggests, ostensibly, that the assistance is earmarked for certain transport, freight and marketing costs.

95. But the instrument does not explain how the assistance provided actually links to, or corresponds with, sugar mills' expenditure on transport, freight and marketing costs. For instance, it does not require mills to verify that they have in fact incurred any of these costs, or to demonstrate the quantum of any such expenditure.

⁷⁴ Central Government of India's 2019–20 Expenditure Budget (**Exhibit JE-121**), Notes on Demands and Grants, 2019–20, Department of Food and Public Distribution, pp. 57–58, line 15.04.

⁷⁵ Central Government of India's 2018–19 Expenditure Budget (**Exhibit AUS-48**), Notes on Demands for Grants, 2018–19, Department of Food and Public Distribution, Demand No. 16, pp. 57 and 59, line 11.05.

⁷⁶ Notes on Demands for Grants, 2020–2021, Ministry of Consumer Affairs, Food and Public Distribution, Demand No. 15, Department of Food and Public Distribution, (**Exhibit JE-142**), lines 10 and 13.

⁷⁷ Dhampur Sugar Mills Limited, Annual Report 2019–20 (**Exhibit JE-149**) line (i), read together with note (a); line (iii), read together with note (c); and lines (iv)(a) and (b), read together with note (d), p. 161–163.

96. Importantly, in simply noting the instrument's purported link to transport, freight and marketing costs, India has failed to offer anything compelling to refute clear evidence that the primary purpose of the assistance is to help satisfy sugar mills' cane price arrears.⁷⁸

97. India disagrees with Australia's claim that the assistance provided under the MAEQ scheme is not linked to actual transport, freight and marketing expenses.⁷⁹

98. In doing so, India emphasises in particular the text of Article 9.1(d), which refers to the "provision of subsidies to reduce the costs of marketing exports..., and the costs of international transport and freight". India asserts a legal standard for Article 9.1(d) – saying that as long as the payments are not in excess of actual costs incurred, then the measure will fall within the meaning of Article 9.1(d).⁸⁰ India then says the burden is on Australia to prove that MAEQ payments exceed actual costs.⁸¹

99. Australia disagrees. Australia has established a *prima facie* case that the MAEQ scheme is an export subsidy within the meaning of Article 9.1(a). India has invoked Article 9.1(d) as part of its defence. It is for India to prove the conditions upon which its defence rests. The proposition that the burden of proof rests upon the party who asserts the affirmative of a particular defence is well accepted in WTO dispute settlement proceedings.⁸²

100. India has provided no evidence of the actual costs of the transport, freight and marketing of sugar exports, leaving the Panel with no basis upon which to make an objective assessment of the matter in India's favour.

101. Likewise, India has provided no evidence to substantiate a link between the assistance provided – which clearly goes towards paying cane price arrears – and "internal transport and freight charges on export shipments" as indicated in Article 9.1(e).

⁷⁸ Notification No. 1(14)/2019-S.P.-I. of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution of 12 September 2019 (**Exhibit JE-114**), para. 1.

⁷⁹ India's responses to questions from the Panel prior to the first substantive meeting, 18 June 2020, question 29, p. 21.

⁸⁰ India's first written submission, para. 118; India's responses to questions from the Panel prior to the first substantive meeting, 18 June 2020, question 36, answered as question 35, p. 24.

⁸¹ India's responses to questions from the Panel prior to the first substantive meeting, 18 June 2020, question 29, p. 21.

⁸² Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14; Appellate Body Report, *EC – Hormones*, para. 98; Panel Report, *Turkey – Textiles*, para. 9.57; Panel Report, *Argentina – Textiles and Apparel*, paras. 6.34–6.40.

102. India has thus not proved that its measure satisfies either Article 9.1(d) or (e). Therefore, India has failed to establish, as a first step, that Article 9.4 is a relevant consideration in this dispute.⁸³

3. India is not exempt from the prohibition on export subsidies under Article 3 of the SCM Agreement

103. Turning briefly now to India's defence to Australia's export subsidies claims under the SCM Agreement.

104. India says that the prohibition on export subsidies under Article 3.1(a) of the SCM Agreement does not apply to it, by virtue of Article 27.2.

105. India accepts that it is now subject to Article 27.2(b), having graduated from coming under Annex VII(b) in 2017.⁸⁴ However, India does not accept the unambiguous terms of Article 27.2(b), which state that the Article 3.1(a) exemption lasted for an eight year period from the date of the entry into force of the WTO Agreement. Instead, India claims its eight year period commenced upon its graduation from Annex VII(b), based on an unsustainable interpretation of various provisions of the SCM Agreement.⁸⁵

106. India's argumentation on this point is unconvincing. It is not based on an interpretation of Article 27.2(b) in accordance with the ordinary meaning of its terms in their context and in light of the object and purpose of the SCM Agreement. And it recycles argumentation that the panel in *India – Export Related Measures* did not accept.⁸⁶

107. Australia acknowledges, and India emphasises, that panel report is subject to appeal.⁸⁷ Nevertheless, Australia considers the panel's reasoning on this issue in that dispute is sound.

⁸³ Australia's responses to Panel questions 1 to 44, 18 June 2020, question 43(a), para. 134.

⁸⁴ India's first written submission, para. 132.

⁸⁵ India's first written submission, paras. 133–145.

⁸⁶ Panel Report, *India – Export Related Measures*, para. 7.74.

⁸⁷ Australia's first written submission, footnote 572; India's first written submission, para. 144.

108. Finally, India claims Australia has failed to demonstrate the existence of a subsidy within the meaning of Article 1.1 of the SCM Agreement. In support, it repeats its argument that Australia has not presented evidence of a government entity actually "making" a financial contribution in relation to any of the challenged measures.

109. For the same reasons that India's defence on this basis under the Agreement on Agriculture must fail, it unquestionably must also fail under the SCM Agreement.

IV. CONCLUSION

110. Australia asks the Panel to find that India maintains domestic support to sugarcane in violation of Article 7.2(b) of the Agreement on Agriculture, and export subsidies for sugar inconsistent with Articles 3.3 and 8 of that Agreement and Articles 3.1(a) and 3.2 of the SCM Agreement. Consistently with those findings, we ask the Panel to recommend India bring its measures into conformity with those Agreements.

111. Finally, Australia requests the Panel to find that India is obliged to notify its domestic support for sugarcane and its export subsidies for sugar, that India has not done so and to recommend that India bring itself into compliance by making those notifications. Regular and timely notifications will support the complainants' ability to assess India's compliance with the Panel's other recommendations.

112. I would like to conclude by thanking the Panel and the Secretariat staff for your work in preparing for this first substantive meeting with the parties – a task that has of course been made more complex by the COVID-19 pandemic. We look forward to the remainder of the proceedings this week and to answering your questions.

113. Thank you.